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SUPREME COURT, U.S.

NO. 80-6732

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

ORIVLLE GENE VINSON,

Petitioner,

-vs-

ROBERT RAINES,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	-iii-
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT:	
I. THE DISTRICT COURT FOUND NO REASON TO DISTURB THE TRIAL COURT'S RULING ON THE ISSUE OF VOLUNTARINESS; THE ISSUE OF INTOXICATION WAS INEXTRICABLY BOUND UP WITH THE ALLEGATION OF BLACKOUTS.	2
II. THE TRIAL COURT CLEARLY INSTRUCTED THE JURY THAT THE STATE HAD TO PROVE THAT PETITIONER INTENDED TO COMMIT ROBBERY.	8
III. THE TRIAL COURT INSTRUCTED THE JURY THAT TESTIMONY OF AN ACCOMPLICE HAD TO BE CORROBORATED, AND DEFENSE COUNSEL DID NOT OBJECT TO THE INSTRUCTIONS.	9
IV. PETITIONER'S COUNSEL OFFERED NO DEFINITION OF "REASONABLE DOUBT," AND THE INSTRUCTIONS, VIEWED AS A WHOLE, CORRECTLY INFORMED THE JURY ABOUT THE STATE'S BURDEN OF PROOF WITH RESPECT TO EVERY ELEMENT OF THE OFFENSE.	10
V. THE EVIDENCE WAS SUFFICIENT TO CONVINCE A RATIONAL TRIER-OF-FACT OF GUILT BEYOND A REASONABLE DOUBT.	14
CONCLUSION	15

TABLE OF CASES AND AUTHORITIES

Case	Page
Bryan v. Wainwright 588 F.2d 1108 (5th Cir. 1979)	13
Caminetti v. United States 242 U.S. 470 37 S.Ct. 192 61 L.Ed. 442 (1917)	10
Crisafi v. Oliver 396 F.2d 293 (9th Cir. 1968)	7
Cupp v. Naughten 414 U.S. 141 94 S.Ct. 396 38 L.Ed.2d 368 (1973)	8,11
De Carlo v. United States 422 F.2d 237 (9th Cir. 1970)	10
Dunn v. Perrin 570 F.2d 21 (1st Cir. 1978)	13
Henderson v. Kibbe 431 U.S. 145 97 S.Ct. 1730 52 L.Ed.2d 203 (1977)	12
In re Winship 397 U.S. 358 90 S.Ct. 1068 25 L.Ed.2d 368 (1970)	11
Perez v. Metz 459 F.Supp. 1131 (S.D.N.Y. 1977)	10
State v. Canedo 115 Ariz. 60 563 P.2d 315 (Ct.App. 1977)	11
State v. Clark 102 Ariz. 550 434 P.2d 636 (1967)	3
State v. Edwards 111 Ariz. 357 529 P.2d 1174 (1974)	3
State v. Magby 113 Ariz. 345 554 P.2d 1272 (1976)	3

United States v. Larosa
450 F.2d 1057
(3d Cir. 1971) 10

United States v. Lawson
507 F.2d 433
(7th Cir. 1974) 13

United States ex rel. Burbank v. Warden,
Illinois State Penitentiary
535 F.2d 361
(7th Cir. 1976) 7

Young v. Wyrick
451 F.Supp. 576
(W.D.Mo. 1978) 8

AUTHORITIES

Ariz.Rev.Stat.Ann.
§ 13-302 10

28 U.S.C.
§ 1254(1) 1

Jackson v. Virginia
443 U.S. 307
99 S.Ct. 2781
61 L.Ed.2d 560 (1979) 14,15

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Assuming, arguendo, that the Ninth Circuit's denial of a certificate of probable cause is tantamount to a "judgment" or "decree" within the meaning of that statute, respondent points out that petitioner does not ask for any form of relief. He asks merely that this Court grant the petition for certiorari.

STATEMENT OF THE CASE

Petitioner was arrested and charged with six counts of armed robbery stemming from a series of robberies committed in Phoenix between 4:00 and 8:00 p.m. on November 22, 1975. Shortly after the last robbery, police received a description of the suspect vehicle, a dark-colored pickup truck. Petitioner was driving the truck when police stopped him about 10 minutes after the last robbery. In addition, officers found money scattered on the floor of the truck, wads of bills in petitioner's pockets, and the .410 shotgun used in the robberies beneath the front seat.

In statements to the police, petitioner admitted that the truck was his, that he had picked up the individuals who actually committed the robberies, and had driven around with them all afternoon until they were stopped by the authorities. (R.T. of Vol II, at 200-04.) At trial, petitioner's defense was that he could not remember the robberies or the arrest because of an alleged "blackout" induced by heavy drinking. Pat Chandler, petitioner's nephew and one of the actual participants, testified that petitioner suggested the robberies to obtain money for a payment on petitioner's truck. (Id. at 283-86.) The state moved to dismiss one count, and petitioner was convicted of the five remaining counts. Petitioner was sentenced to a term of 40 to 60 years.

The judgment was affirmed on appeal. No. 1 CA-CR 1991 (Memorandum Decision, Apr. 26, 1977.) Rehearing was denied May 27, 1977. The Arizona Supreme Court denied review June 28, 1977. On July 14, 1977, petitioner filed a motion requesting the Arizona Supreme Court to provide findings of fact and conclusions of law in support of the denial of review. The supreme court denied that motion September 8, 1977.

Having exhausted his state remedies, petitioner instituted an action for a writ of federal habeas corpus. The district court denied relief September 30, 1980. Subsequently, the district court denied a certificate of probable cause, terming the appeal "frivolous." December 23, the Ninth Circuit denied petitioner's application for a certificate of probable cause. The Ninth Circuit denied petitioner's motion for rehearing February 23, 1981.

REASONS FOR DENYING THE WRIT

ARGUMENT

I

THE DISTRICT COURT FOUND NO REASON TO DISTURB THE TRIAL COURT'S RULING ON THE ISSUE OF VOLUNTARINESS; THE ISSUE OF INTOXICATION WAS INEXTRICABLY BOUND UP WITH THE ALLEGATION OF BLACKOUTS.

Petitioner claims that both the trial court and the Court of Appeals erred in finding that his statements to police were voluntary because petitioner allegedly suffered from "automatism" or episodic blackouts. According to petitioner, he could not remember the robberies, arrest, or the statements he made to police. In Arizona, voluntariness must be proven by a preponderance of the evidence, and the trial court's findings will not be disturbed absent clear and manifest error. State v.

Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974). Under Arizona law, intoxication does not preclude the admission of statements unless the accused was so intoxicated that the statements should be considered involuntary or untrustworthy. State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976); State v. Clark, 102 Ariz. 550, 434 P.2d 636 (1967). Voluntariness is to be determined by all the circumstances.

There is no question that petitioner had been drinking the day of the robberies. However, none of the officers who arrested and spoke with petitioner described him as intoxicated. To the contrary, they all testified that petitioner had good coordination, normal speech, and no problem walking. (R.T. of Vol. II, at 167, 200-05, 217, 246.) The especially critical testimony of Officer Tony Marks reveals that petitioner was quite aware of what he had been doing all afternoon. After Officer Marks gave petitioner Miranda warnings (approximately 1 hour after arrest), petitioner acknowledged them. (Id. at 203.) When Officer Marks asked whether petitioner would voluntarily speak with police, petitioner replied with the cleverly ambiguous phrase, "That's debateable [sic]." (Id. at 206.) Marks then asked petitioner to relate what had happened from the early afternoon hours of that day until police had arrested him. Petitioner had no difficulty recalling that he had picked up the three other individuals involved (Gary Amy, Michael Marley, and Patrick Chandler, petitioner's nephew) and had driven around in his pickup truck until arrested. (Id. at 204.) Thus, petitioner did not say that he could not remember what he had been doing during the time the robberies occurred -- he said that he had been driving around with three people until the police

stopped his truck. Any alleged "blackout" was surely selective, because the only thing petitioner could not remember was the robberies. Moreover, several other statements made to Officer Marks make it evident that petitioner never "blacked out." Although Marks informed petitioner of the charges, there is nothing in the record to indicate that Marks mentioned anything about money on the floor of the truck or the shotgun discovered beneath the front seat. Nonetheless, petitioner told Marks that he knew nothing about the robberies, the money or the gun found in the truck. If petitioner had been unaware of what was going on during the robberies, he would have known nothing about the money or the shotgun. Petitioner also told Officer Marks that the truck was his (although registered in his wife's name), and that he made payments on it. Interestingly, petitioner told Marks that he was poor and could not meet a payment due on the truck. (Id. at 204.) According to Patrick Chandler, lack of money to pay for the truck was the motive petitioner gave for suggesting the robberies. (Id. at 283-86.)

At the extensive voluntariness hearing, petitioner testified that he did not remember the robberies, the arrest, Miranda warnings, or questions from the police. (Id. at 209-14.) At the hearing, petitioner produced two witnesses who testified that petitioner, at times, seemed unable to recall what he had done during previous periods when he was drinking. At this point, respondent calls the Court's attention to the fact that neither petitioner nor any of his witnesses ever separated the question of blackouts from intoxication. There is not one shred of competent testimony to indicate that anything except heavy drinking caused these alleged blackouts. Petitioner now

seeks to create an artificial dichotomy between his drinking and the alleged blackouts -- a distinction never even suggested until petitioner filed for habeas corpus in the district court. Petitioner's testimony at the hearing and his assertions in the original petition are contradictory. Unequivocally, at the hearing, petitioner said he could not recall certain things because of his drinking. (Id. at 213.) The first ground discussed in the original petition reiterates the contention that alcohol caused his alleged blackout. At page q of the appendix to that petition, however, petitioner states: "Although petitioner is an alcoholic, this is not the cause of his blackouts." That statement completely contradicts petitioner's own testimony and that of his witnesses. The issue of blackouts was never raised at trial or on appeal except in conjunction with petitioner's drinking.

In addition, neither of petitioner's witnesses (Jerry Mangus and June Vinson, petitioner's ex-wife) saw petitioner in the afternoon on the day of the robberies, and could not testify with respect to his condition between 4:00 p.m. and 8:00 p.m., when the robberies took place. Moreover, Mr. Mangus' testimony shed no light on how anyone could discern when petitioner might be suffering an alleged blackout. Mangus testified that petitioner appeared quite normal, carried on conversations, and experienced no problem walking. (Id. at 228-29.) In view of Mangus' description of petitioner's apparently normal behavior, the prosecutor asked Mr. Mangus how he knew that petitioner would later not recall what he was doing at that moment. Mr. Mangus replied: "I can tell when nobody else can." (Id. at 230.) There was no medical testimony to substantiate petitioner's allegation of alcohol-related

lapses of memory. Furthermore, from a logical and legal point of view, petitioner's contention of blackouts would not negate the voluntariness of statements to the police or constitute a defense to the crimes charged. When petitioner states that he "blacked out," he is saying simply that he does not remember doing something. That, of course, is quite different from asserting that one was not conscious of what he was doing at the moment he was doing it. Consequently, petitioner's allegations of subsequent lapses of memory, even if accepted at face value, do not prove that he was unaware of prior actions at the moment he was engaged in them. Petitioner obviously cannot claim that he was physically unconscious when the robberies occurred because he admitted driving the truck all afternoon until arrested.

At trial -- not at the voluntariness hearing -- defense counsel attempted to adduce testimony about an alleged operation performed upon petitioner in 1969 by a neurosurgeon. Defense counsel had not subpoenaed the neurosurgeon and made no offer of expert testimony about the effects of such surgery. Since the jury would have had no expert testimony to explain possible effects of surgery, the trial court did not allow lay testimony on the subject. (Supplemental Transcript, at 54-55.) Having presented no medical evidence about this alleged operation, petitioner now attempts to blend the drinking with the operation and let this Court decide which might be responsible for his "involuntary" statements to the police. Even now petitioner cannot decide which point to press, as one may observe by comparing subsection 1 of page 1 of the original petition with page 1 of the appendix to the petition. Subsection 1 states that petitioner blacks

out while drinking. Subsection 3 alleges that petitioner had over 30 cans of beer shortly before the robberies (actually at least 4 hours before). At the bottom of that same page, however, petitioner states that the Arizona courts considered "the intoxication question only." Since petitioner had alleged that his memory lapses were the result of his drinking, there was no separable issue of alcoholic blackouts before the courts, and no competent evidence of any alleged surgery.

The federal standard for determining voluntariness of admissions is a preponderance of the evidence -- the same standard employed in Arizona. United States ex rel. Burbank v. Warden, Ill. State Penitentiary, 535 F.2d 361 (7th Cir. 1976). The Arizona courts found that the state had borne its burden upon the issue of voluntariness. Respondent respectfully submits that the testimony of four police officers about petitioner's appearance and actions (particularly the testimony of Officer Marks), coupled with the nature of petitioner's own statements (i.e., mention of the money and shotgun when Officer Marks had said nothing about them), unequivocally demonstrates that the state carried its burden. Admissibility of evidence is a matter of state law, and federal courts will not intervene unless the state court's ruling deprives the defendant of fundamental due process. Crisafi v. Oliver, 396 F.2d 293 (9th Cir.), cert. denied, 393 U.S. 889 (1968). Respondent submits that the district court was correct in ruling that there was no deprivation of due process in admitting petitioner's statements.

ARGUMENT

II

THE TRIAL COURT CLEARLY INSTRUCTED THE JURY THAT THE STATE HAD TO PROVE THAT PETITIONER INTENDED TO COMMIT ROBBERY.

Petitioner isolates one part of the jury instructions and asserts that it lessened the state's burden of proof. Jury instructions must be considered as a whole. Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); Young v. Wyrick, 451 F.Supp. 576 (W.D. Mo.), aff'd, 590 F.2d 40 (8th Cir. 1978). In addition to the instruction cited by petitioner, the trial court gave the following instructions:

> The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means the state must prove all of its case against defendant.
>
> The State must prove the defendant guilty beyond a reasonable doubt.
>
> The State must prove that the defendant has done an act which is forbidden by law and that he intended to do it. . . .
>
> Robbery has four elements:
>
> 1. There must be a taking of personal property which is in the possession of the victim; and
>
> 2. The taking must be from the victim's person or his immediate presence; and
>
> 3. The taker must intend to take the property from the victim permanently; and
>
> 4. The taking must be against the victim's will by means of force or fear.
>
> The victim may be in fear when:
>
> (1) He fears physical injury to himself or his property; or (2) he fears immediate physical injury to the person or property of someone in his presence.
>
> An act done by an intoxicated person may still be a crime. However, for the

> crime of robbery the State must prove intent to (1) commit the crime of robbery, and (2) take property from a victim permanently. You may consider the fact that he was intoxicated at the time in determining whether the defendant could intend to (1) commit the crime of robbery and (2) take property from a victim permanently.

(R.T. of Vol. II, at 397-98; emphasis added.) It is clear that the trial court three times instructed the jury that the state had to prove intent to commit the offense. Respondent submits that the instructions, viewed as a whole, correctly informed the jury of the state's burden of proof with respect to the element of intent, and the district court so found.

ARGUMENT

III

> THE TRIAL COURT INSTRUCTED THE JURY THAT TESTIMONY OF AN ACCOMPLICE HAD TO BE CORROBORATED AND DEFENSE COUNSEL DID NOT OBJECT TO THE INSTRUCTIONS.

Petitioner is correct in his assertion that the trial court should have informed the jury that Patrick Chandler was an accomplice as a matter of law instead of submitting that question to the jury. The Court of Appeals acknowledged that the trial court erred in submitting the question of accomplice status to the jury, but noted that petitioner waived the issue by failing to object to that instruction. (Court of Appeals Opinion, at 4-5.) However, the trial court also gave the following instruction:

> You are not permitted to determine guilt based only on the statements of an accomplice. There must be other evidence indicating that the defendant committed the crime.

(R.T. of Vol. II, at 398.) Consequently, the trial court correctly informed the jury that corroboration other than the testimony of an accomplice was necessary to convict. (Arizona no longer requires corroboration of an

accomplice's testimony. Ariz.Rev.Stat.Ann. § 13-302.) Petitioner's voluntary admissions that he owned the truck and had been driving it all afternoon before the arrest constituted further corroboration. Several police officers testified that petitioner was the driver, that they found money all over the floorboard, wads of money in petitioner's pockets (although he told Officer Marks that he had no money to make the payment on his truck), and the .410 shotgun (a gift from petitioner to Patrick Chandler) under the front seat. (Id. at 179-85, 189-91, 204, 317-19.)

Finally, even if Chandler's testimony had been uncorroborated, that would not amount to a question of constitutional magnitude. Federal courts have long held that a conviction based on the uncorroborated testimony of an accomplice does not offend due process. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917); United States v. DeLarosa, 450 F.2d 1057 (3d Cir. 1971), cert. denied, 405 U.S. 927 (1972); DeCarlo v. United States, 422 F.2d 237 (9th Cir. 1970); Perez v. Metz, 459 F.Supp. 1131 (S.D.N.Y. 1977).

ARGUMENT

IV

PETITIONER'S COUNSEL OFFERED NO DEFINITION OF "REASONABLE DOUBT," AND THE INSTRUCTIONS TO THE JURY, VIEWED AS A WHOLE, CORRECTLY INFORMED THE JURY ABOUT THE STATE'S BURDEN OF PROOF WITH RESPECT TO EVERY ELEMENT OF THE OFFENSE.

Although trial counsel for petitioner objected to lack of a definition of reasonable doubt, he offered no definition of the concept. (R.T. of Vol. II, at 400.) In affirming the conviction, the Arizona Court of Appeals

pointed out that the comment to the instruction the court gave concerning reasonable doubt noted the absence of a universally accepted definition and the futility of attempting to define the term. (Memorandum Decision of the Court of Appeals, at 6-7.) The Court of Appeals also noted that Division II of that court had held that failure to define "reasonable doubt" did not constitute reversible error. State v. Canedo, 115 Ariz. 60, 563 P.2d 315 (Ct.App. 1977). The trial court twice instructed the jury about the state's burden of proof and fully explained the elements the state had to prove. (R.T. of Vol. II, at 396-98.) In addition, the trial court gave a presumption of innocence instruction. (Id. at 397.)

Jury instructions must be considered in their totality. Cupp v. Naughten, supra. To find petitioner's argument persuasive, this Court would have to conclude that, even though the trial court twice properly instructed the jury about the state's burden to prove all elements beyond a reasonable doubt, the failure to further define the phrase (when defense counsel himself offered no definition) amounted to constitutional error. The further implicit assumption in petitioner's argument is that a jury cannot comprehend what "reasonable doubt" means without an elaborate explanation.

The case that held proof beyond a reasonable doubt to be constitutionally required did not define "reasonable doubt" or hold that any more detailed definition had to be given. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The explicit holding of this Court in Winship was "that the Due Process Clause protects the

accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Id. at 364.) Thus, this Court was primarily concerned that the jury should be aware of all the elements and facts essential to conviction, and then apply the standard of reasonable doubt to those facts.

When one complains that an instruction was incomplete instead of erroneous, he bears a particularly heavy burden of demonstrating prejudice:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", Cupp v. Naughten, 414 U.S., at 147, 94 S.Ct., at 400, 38 L.Ed.2d 368, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id., at 146, 94 S.Ct., at 400.
>
> In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation--beyond the reading of the statutory language itself--of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.

Henderson v. Kibbe, 431 U.S. 145, 154-55, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203, 212-13 (1977) (emphasis added; footnote omitted). In Kibbe, this Court affirmed the conviction even though the trial court had not completely defined a causation element necessary to sustain a conviction of second degree murder. Considering all the instructions, this Court held that the issue of causation had been adequately raised, and that the jury had been

properly instructed about the state's burden of proof beyond a reasonable doubt with respect to all elements of the crime. There is no indication in the opinion that the trial court attempted to define "reasonable doubt."

Respondent submits that "reasonable doubt" is not a complex legalism requiring further definition. The jury may use their common sense. It is also significant that defense counsel in his closing argument repeatedly mentioned the burden of reasonable doubt in conjunction with the specific elements the state had to prove. (Id. at 371, 381.) Defense counsel, however, never offered a definition of reasonable doubt. Federal courts have consistently held that the failure to define terms that are not inherently recondite does not amount to constitutional error. Bryan v. Wainwright, 588 F.2d 1108 (5th Cir. 1979) (jury could understand concept of "depraved mind" without further instruction). On the contrary, the true danger arises when the court misstates the law. Cf. Dunn v. Perrin, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978) (trial court gave three conflicting definitions of "reasonable doubt" and thereby shifted the burden of proof to the defendant). Respondent contends that the rationale of United States v. Lawson, 507 F.2d 433 (7th Cir.), cert. denied, 420 U.S. 1004 (1974), is persuasive:

> [W]e are of the opinion that the failure to give a defining instruction of "beyond a reasonable doubt," even though an acceptable instruction has been tendered, should not be the basis for reversing an otherwise fairly conducted trial. We also, of course, are assuming that the jury has been instructed that the prosecution must prove its case beyond a reasonable doubt and that the burden of doing so remains with the prosecution.

> We are here dealing with ordinary English words of common acceptance. "I doubt that" is a common expression. It is ordinary practice in negligence cases to instruct on the standard of care of a reasonable man. It would not seem to serve much purpose to resort to the antonym and define reasonable doubt as being doubt that was not unreasonable under the evidence. The phrase is not esoteric, such as res ipsa loquitur, nor is it confusingly similar to other more common words such as "proximate" or some of those employed in patent law.
>
> Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion. . . .
>
> The essential aspect of the matter it appears to us is that the jury clearly understand that there must be proof persuasive beyond a reasonable doubt. Defining the term should be at the option of the trial judge even though a defining instruction is tendered. Lack of definition would not appear to be prejudicial.

507 F.2d at 441-42 (footnotes omitted). Respondent respectfully submits that the jury understood the meaning of "reasonable doubt" (twice reiterated by the court in instructions, and four times alluded to by defense counsel in closing argument), the state's burden of proving each element of the offenses, and the fact that reasonable doubt had to be generated by the evidence or lack of it. The district court found no error in the instructions.

ARGUMENT

V

THE EVIDENCE WAS SUFFICIENT TO CONVINCE A RATIONAL TRIER-OF-FACT OF GUILT BEYOND A REASONABLE DOUBT.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Court established a new evidentiary standard for habeas corpus review:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254--if the settled procedural prerequisites for such a claim have otherwise been satisfied--the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324, 99 S.Ct. at 2792, 61 L.Ed.2d at 576-77 (footnote omitted). When one considers the testimony of Patrick Chandler, an accomplice, the fact that petitioner was driving the truck, that money was visible on the floor of the truck and the shotgun underneath the front seat, and petitioner's own statements to the police, it is absurd to contend that no rational trier of fact could find petitioner guilty beyond a reasonable doubt. Respondent submits that the evidence was more than sufficient under the standard announced in Jackson, and the district court agreed.

CONCLUSION

Respondent submits that there is no basis for granting certiorari. Every court, state or federal, that has considered petitioner's claims, has found them to be without merit. Therefore, this Court should deny certiorari.

Respectfully submitted,

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